U.S. Department of Labor

Office of Administrative Law Judges
Seven Parkway Center - Room 290
Pittsburgh, PA 15220

(412) 644-5754
(412) 644-5005 (FAX)

Issue Date: 13 February 2006

CASE NO.: 2002-BLA-5482

In the Matter of

DELVIN MILLER,
Claimant

v.

PEABODY COAL COMPANY,
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

Wendle Cook, Esq.,
For the Claimant

Paul E. Frampton, Esq.,
For the Employer

Before: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS[1]

This proceeding arises from a miner's subsequent claim for benefits, under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq*., as amended ("Act"), filed on February 21, 2001 respectively. The Act and implementing regulations, 20 C.F.R. parts 410, 718, and 727 (Regulations), provide compensation and other benefits to:

1. Living coal miners who are totally disabled due to pneumoconiosis and their dependents;

[1] Sections 718.2 and 725.2(c) address the applicability of the new regulations to pending claims.

2. Surviving dependents of coal miners whose death was due to pneumoconiosis; and,
3. Surviving dependents of coal miners who were totally disabled due to pneumoconiosis at the time of their death.

The Act and Regulations define pneumoconiosis ("black lung disease" or "coal worker's pneumoconiosis" ("CWP") as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment.

PROCEDURAL HISTORY

This is the Claimant's fourth claim for benefits. He filed his first claim on June 19, 1973 (Director's Exhibit ("DX") 1). That claim was denied by the Social Security Administration ("SSA") because the Claimant was still working as a coal miner and therefore not totally disabled due to pneumoconiosis. On May 2, 1979, after the Claimant had requested a review of his claim, the SSA again issued a denial. The claim was subsequently reviewed by the Department of Labor, which issued a denial on December 4, 1980 due to a failure to establish total disability due to pneumoconiosis.

The Claimant filed his second claim on July 20, 1989 (DX 2). The Deputy Commissioner denied the Claim, finding that the Claimant failed to establish the presence of pneumoconiosis, that pneumoconiosis was caused by coal mine employment, total disability, total disability due to pneumoconiosis, or a material change in conditions since the previous denial. The matter was transferred to the Office of Administrative Law Judges for a formal hearing, but on April 18, 1991, the case was remanded to the District Director for the purpose of notifying the responsible operator as mandated by the applicable regulations. Subsequently, the Claimant requested a withdrawal of his claim, which the District Director granted on July 15, 1991.[2]

The Claimant filed his third claim on October 29, 1993 (DX 3). That claim was denied by the District Director because the Claimant again failed to show any element of entitlement or a material change of condition since the prior final denial. There is no record of any further hearing held in connection with the third claim.

The Claimant filed the current claim on February 21, 2001 (DX 5). The District Director denied the claim on April 23, 2002 because the evidence failed to establish the presence of pneumoconiosis, that any pneumoconiosis was caused by coal mine employment, and that the disease has caused total disability. On May 15, 2002, the Claimant requested a hearing on the matter before an Administrative Law Judge (DX 30). On September 3, 2002, the case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Program ("OWCP") for a formal hearing (DX 34).

[2] Issues concerning this withdrawal are governed by the pre-Amendment regulations. Pursuant to 20 C.F.R. § 725.306(b) (2000), when a claim has been withdrawn, it "will be considered not to have been filed." Therefore, any evidence submitted in connection with this claim will not be considered in the current claim, as it is not offered in the present case.

This case was originally assigned to Judge Robert J. Lesnick. After the case was scheduled for hearing, Employer moved for a continuance, which Judge Lesnick granted. I was subsequently assigned the case and, after a series of continuances, I held a hearing on August 31, 2005 in Charleston, West Virginia, at which the Claimant and Employer were represented by counsel.[3] No appearance was entered for the Director, OWCP (Hearing Transcript ("TR") 5). The parties were afforded the full opportunity to present evidence and argument. Claimant's exhibits ("CX") 1 and 2, Director's exhibits ("DX") 1-36, and Employer's exhibits ("EX") 1-12 were admitted into the record.

ISSUES

I. Whether the miner has pneumoconiosis as defined by the Act and the Regulations?

II. Whether the miner's pneumoconiosis arose out of his coal mine employment?

III. Whether the miner is totally disabled?

IV. Whether the miner's disability is due to pneumoconiosis?

V. Whether there has been a change in an applicable element of entitlement upon which the order denying the prior claim became final?

FINDINGS OF FACT

I. Background

A. Coal Miner

The claimant was a coal miner, within the meaning of § 402(d) of the Act and § 725.202 of the Regulations. The parties stipulated at the hearing that the Claimant worked in coal mine employment for 40 years (TR 6).

B. Date of Filing

The claimant filed his claim for benefits, under the Act, on February 21, 2001 (DX 5). None of the Act's filing time limitations are applicable; thus, the claim was timely filed.

[3] Under *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1998)(*en banc*), the location of a miner's last coal mine employment, here the state in which the hearing was held, is determinative of the circuit court's jurisdiction.

C. Responsible Operator[4]

Peabody Coal Co. is the last employer for whom the claimant worked a cumulative period of at least one year and is the properly designated responsible coal mine operator in this case, under Subpart G. Moreover, Employer withdrew its controversion of the Responsible Operator issue (TR 6).

D. Dependents

The claimant has one dependent for purposes of augmentation of benefits under the Act, his wife Ardella. (DX 5).

E. Personal, Employment and Smoking History[5]

The claimant was born on October 6, 1932 (DX 5). He married Ardella Price on September 12, 1959. (DX 5). The Claimant's last position in the coal mines was that of a central control operator. (TR 18). His previous jobs include laborer, slate picker, truck driver, bulldozer operator, car dropper, and utility worker (TR 10-18). The parties have stipulated that the Claimant was exposed to significant amounts of coal mine dust during his years in coal mine employment (TR 27).

There is evidence of record that the claimant's respiratory disability is due, in part, to his history of cigarette smoking. The evidence is conflicting concerning the miner's smoking history. However, I find he smoked approximately a half-pack per day for 25 years. The primary sources of evidence in resolving this conflict are the Claimant's testimony and the doctors' reports. The Claimant testified that he smoked a half-pack per day intermittently for approximately 20-25 years. Three doctors' reports report smoking histories. These histories vary in intake level from a third-pack to a pack and in duration from 20 years to 36 years.[6] In resolving this conflict, the testimony of the claimant is most relevant. Unlike the doctors, the claimant has direct first-hand knowledge of his own smoking history; additionally, such testimony is under oath. Accordingly, I credit the Claimant's account that he smoked a half-pack per day for 25 years. Moreover, this finding represents an approximate middle ground when considering the various smoking histories presented.

[4] Liability for payment of benefits to eligible miners and their survivors rests with the responsible operator, or if the responsible operator is unknown or is unable to pay benefits, with the Black Lung Disability Trust Fund. 20 C.F.R. § 725.493(a)(1) defines responsible operator as the claimant's last coal mine employer with whom he had the most recent cumulative employment of not less than one year.

[5] "The BLBA, judicial precedent, and the program regulations do not permit an award based solely upon smoking-induced disability." 65 Fed. Reg. 79948, No. 245 (Dec. 20, 2000).

[6] Smoking histories are reported in DX 13, CX 2, and EX 1. It should be noted that DX 13 provides two different smoking durations: 36 years and 29 years.

II. Medical Evidence[7]

The following is a summary of the evidence submitted in connection with the current claim.

A. Chest X-rays[8]

There are six admitted X-ray readings. Five of the readings are properly classified for pneumoconiosis, pursuant to 20 C.F.R. § 718.102(b).[9] One is positive[10] by Dr. Patel, who is a B-reader and Board-certified in radiology.[11] Four are explicitly negative, by Drs. Hayes, Wheeler, Scatarige, and Scott, all of whom are B-readers and Board-certified in radiology. Additionally, Dr. Cordell's X-ray reading contains no impression of pneumoconiosis.

The admitted X-ray evidence is summarized in the table below:

Exhibit Number	**Dates: X-ray/ Reading**	**Reading Physician**	**Qualifications**	**Film Quality**	**ILO Classification**	**Interpretation or Impression**
DX 14	3/20/01[12]	Cordell				No acute pulmonary infiltrate; chronic obstructive pulmonary disease; density in right lobe is most consistent with scarring.
DX 19	4/20/01 5/1/01	Hayes	B-reader Board certified	1		No abnormalities consistent with pneumoconiosis.
CX 1	2/8/05 2/8/05	Patel	B-reader Board certified	1	1/1	s,s all zones
EX 2	6/13/01	Wheeler	B-reader	2		No abnormalities

[7] *Dempsey v. Sewell Coal Co. & Director, OWCP,* 23 B.L.R. 1-47 (2004). (BRB upheld regulatory limitations on the admissibility of medical evidence, under the new 2001 regulations, i.e., 20 C.F.R. Sections 725.414 and 725.456(b)(1)).

[8] Unless otherwise indicated compliance with the requirements of Appendix A shall be presumed. 20 C.F.R. § 718.102(e).

[9] ILO-UICC/Cincinnati Classification of Pneumoconiosis – The most widely used system for the classification and interpretation of X-rays for the disease pneumoconiosis. This classification scheme was originally devised by the International Labor Organization (ILO) in 1958 and refined by the International Union Against Cancer (UICQ) in 1964. The scheme identifies six categories of pneumoconiosis based on type, profusion, and extent of opacities in the lungs. The lone X-ray reading not classified pursuant to the requirements of the Regulations is DX 14.

[10] The minimum interpretation that qualifies as positive for the presence of pneumoconiosis under 20 C.F.R. § 718.102(b) is 1/0.

[11] *LaBelle Processing Co. v. Swarrow,* 72 F.3d 308, 310 n.3 (3rd Cir. 1995). ("A "B-reader" is a physician, often a radiologist, who has demonstrated proficiency in reading X-rays for pneumoconiosis by passing annually an examination established by the National Institute of Safety and Health and administered by the U.S. Department of Health and Human Services. *See* 20 C.F.R. § 718.202(a)(1)(ii)(E); 42 C.F.R. § 37.51. Courts generally give greater weight to X-ray readings performed by "B-readers." *See Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 108 S.Ct. 427, 433 n.16, 98 L.Ed. 2d 450 (1987); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n.2 (7th Cir. 1993).").

[12] The exhibit does not reflect whether this date refers to the date of the X-ray or the date of the reading.

	6/20/01		Board certified			consistent with pneumoconiosis.
EX 3	4/27/05 5/17/05	Scatarige	B-reader Board certified	2		No abnormalities consistent with pneumoconiosis.
EX 11	2/8/05 4/17/05	Scott	B-reader Board certified	1		No abnormalities consistent with pneumoconiosis.

CT Scans

The Employer submitted four readings of two CT scans, all read by Board Certified Radiologists (EX 4). They show evidence of emphysema but no evidence of coal workers' pneumoconiosis (CWP). A CAT scan falls into the "other means" category of 20 C.F.R. § 718.304(c) rather than being considered an X-ray under § 718.304(a). A "CT" or "CAT scan" is "computed tomography scan or computer aided tomography scan. Computed tomography involves the recording of 'slices' of the body with an x-ray scanner (CT scanner). These records are then integrated by computer to give a cross-sectional image. The technique produces an image of structures at a particular depth within the body, brining them into sharp focus while deliberately blurring structures at other depths. *See,* THE BANTAM MEDICAL DICTIONARY, 96, 437 (Rev. Ed. 1990)." *Melnick v. Consolidation Coal Co. & Director, OWCP*, 16 B.L.R. 1-31 (1991). In *Consolidation Coal C. v. Director, OWCP [Stein]*, 294 F.3d 885 (7th Cir. June 25, 2002), 22 B.L.R. 2-409 (2002), the Court rejected the employer's argument that a negative CT is conclusive evidence the miner does not have pneumoconiosis. The DOL has also rejected such a view. Nor need a negative CT be given controlling weight because the statutory definition of "pneumoconiosis" encompasses a broader spectrum of diseases than those pathological conditions which can be detected by clinical test such as X-rays and CT scans.

B. Pulmonary Function Studies[13]

Pulmonary Function Studies ("PFS") are tests performed to measure the degree of impairment of pulmonary function. They range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV_1) and maximum voluntary ventilation (MVV).

The PFS evidence is summarized in the table below.

[13] A "qualifying" pulmonary study or arterial blood gas study yields values which are equal to or less than the applicable table values set forth in Appendices B and C of Part 718. A study "conforms" if it complies with applicable standards (found in 20 C.F.R. § 718.103(b) and (c)). (*See Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 (7th Cir. 1993)).

Physician **Date** **Exhibit #**	**Age** **Height**	**FEV_1**	**MVV**	**FVC**	**Tracings**	**Comprehension** **Cooperation**	**Qualifying** **Conforming**	**Doctor's Impression**
Crisalli 6/27/00 DX 14	67 70"	Pre: .88 Post: .99	Pre: 29 Post: N/A	Pre: 2.93 Post: 3.20	Yes		Pre: Yes Yes Post: Yes Yes	Severe respiratory airflow obstruction; no restrictive defect; severe air trapping; significant post-bronchodilator improvement.
Walker 4/20/01 DX 16	68 69¾"	Pre: .68 Post: .77	Pre: 19 Post: 23	Pre: 2.79 Post: 3.37	Yes	Good Good	Pre: Yes Yes Post: Yes Yes	
Rasmussen 2/8/05 CX 2	72 69"	Pre: .82 Post: .82		Pre: 2.91 Post: 3.26	Yes		Pre: Yes Yes Post: Yes Yes	
Zaldivar 6/13/01 EX 1	68 70"	Pre: .82 Post: .82	Pre: 23 Post: 26	Pre: 4.01 Post: 4.02	Yes		Pre: Yes Yes Post: Yes Yes	
Zaldivar 4/27/05 EX 7	72 70"	Pre: .64 Post: .62		Pre: 3.27 Post: 3.31	Yes		Pre: Yes Yes Post: Yes Yes	Severe irreversible obstruction; severe air trapping; severe diffusion impairment.

*All doctors administered the PFS both before and after the application of bronchodilators.

For a miner of the claimant's height of 70 inches, § 718.204(b)(2)(i) requires an FEV_1 equal to or less than 1.88 for a male 72 years of age.[14] If such an FEV_1 is shown, there must be in addition, an FVC equal to or less than 2.43 or an MVV equal to or less than 75; or a ratio equal to or less than 55% when the results of the FEV_1 tests are divided by the results of the FVC test. Qualifying values for other relevant ages and heights are as depicted in the table below. The FEV_1/FVC ratio requirement remains constant.

Height	Age	FEV_1	FVC	MVV
70"	67	1.95	2.50	78
69¾"	68	1.90	2.44	76
70"	68	1.93	2.44	77
69"	72	1.79	2.31	72

C. Arterial Blood Gas Studies[15]

Blood gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. A lower level of oxygen (O_2) compared to carbon dioxide (CO_2) in the blood, expressed in percentages, indicates a deficiency in the transfer of gases through the alveoli which will leave the miner disabled. The results of the arterial blood gas studies submitted in connection with this claim are summarized in the table below.

[14] The fact-finder must resolve conflicting heights of the miner on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). I find the miner is 70" here, the most often reported height. It should be noted that this determination is particularly important when the discrepancies may affect whether or not the tests are "qualifying." *Toler v. Eastern Associated Coal Co.*, 42 F.3d 3 (4th cir. 1995). This, however, is not the case here because the slight variation in reported height would not have altered the qualifying status of the tests.

[15] 20 C.F.R. § 718.105 sets the quality standards for blood gas studies. 20 C.F.R. §718.204(b)(2) permits the use of such studies to establish "total disability." It provides, "In the absence of contrary probative evidence which meets the standards of either paragraphs (b)(2)(i), (ii), (iii), or (iv) of this section shall establish a miner's total disability:…(2)(ii) Arterial blood gas tests show the values listed in Appendix C to this part…"

Date Exhibit #	Physician	PCO_2	PO_2	Qualify	Physician's Impression
4/20/01 DX 15	Walker	44	71	No	Patient could not perform exercise due to shortness of breath.
2/8/05 CX 2	Rasmussen	38	53	Yes	
6/13/01 EX 1	Zaldivar	41	64	No	
4/27/05 EX 7	Zaldivar	43	58	Yes	

D. Physicians' Reports[16]

A determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis. 20 C.F.R. § 718.202(a)(4). Where total disability cannot be established, under 20 C.F.R. § 718.204(b)(2)(i) through (iii), or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. § 718.204(b).

There are four medical reports admitted as evidence in the current claim.

Dr. James Walker, whose qualifications are not in the record, examined the Claimant on April 20, 2001 (DX 13).[17] His examination report notes 42 years of coal mine employment and

[16] Under the new 2001 regulations, expert opinions must be based on admissible evidence. *Dempsey v. Sewell Coal Co. & Director, OWCP,* 23 B.L.R. 1-47 (2004).

[17] Although Dr. Walker's qualifications are not on the record, I take judicial notice that he is Board certified in surgery and thoracic suregery. *See Maddaleni v. The Pittsburgh & Midway Coal Mining Co.,* 14 B.L.R. 1-135 (1990) aff'd 961 F.2d 1524 (10th Cir. 1992). The B-readership of each doctor is found at the National Institute for Occupational Safety and Health's Certified B-reader list, available at http://cdc.gov/niosh/topics/chestradiography/b-reader-list.html. Evidence of his board certifications presented by the American Board of Medical Specialties, available at www.ambs.org. Any party contesting these findings should file a motion for reconsideration within ten days of the issuance of this Decision and Order.

two different smoking histories. Dr. Walker reported that the Claimant smoked ¾ of a pack of cigarettes for 36 years and also reported ¾ of a pack for 29 years. Dr. Walker stated that the Claimant suffers from sputum, dyspnea, wheezing, and cough.

Based on a negative chest X-ray reading, a PFS test, and a blood-gas study, Dr. Walker concluded that the Claimant did not have coal workers' pneumoconiosis (CWP) but did have a chronic obstructive pulmonary disease (COPD) with bullous emphysema. He attributed this condition to the Claimant's exposure to occupational dust and tobacco smoke.

Dr. D.L. Rasmussen, whose qualifications are not on the record, examined the Claimant and issued a report dated February 8, 2005 (CX 2).[18] He notes 42 years of coal mine employment and a smoking history of between one third and one half pack of cigarettes per day for 35 years. He stated that the Claimant suffers from cough and phlegm with respiratory infection and wheezing with exertion.

Based on the positive X-ray reading by Dr. Patel, a PFS test, an electrocardiogram, and his examination, Dr. Rasmussen diagnosed the Claimant as having a very severe chronic lung disease, generally, and CWP specifically. Dr. Rasmussen further opined that the Claimant has both clinical and legal pneumoconiosis, the later in the form of COPD and emphysema, and that both forms of pneumoconiosis are the primary cause of his lung disease. Dr. Rasmussen also stated that this condition is totally disabling.

Dr. George Zaldivar, who is board-certified in internal medicine with a specialty in pulmonology, examined the Claimant on June 13, 2001 and again on April 27, 2005. He offered a report dated July 3, 2001, which he subsequently supplemented on June 21, 2005 (EX 1, 7). In accordance with 20 C.F.R. § 725.414(c), his deposition transcript is also considered (EX 11). Dr. Zaldival noted over forty years of coal mine employment and also noted the varying accounts of the Claimant's smoking history.

Dr. Zaldivar stated that the Claimant suffered from a severe irreversible airway obstruction, severe air trappings, lung volumes with hyperinflation, severe diffusion impairment high carboxyhemoglobin, and suspected obstructive pulmonary disease. Based on a negative chest X-ray reading, a review of medical records, and his examination, Dr. Zaldival concluded, in 2001, that the Claimant did not suffer from pneumoconiosis but rather suffered from emphysema. He also stated that the Claimant is disabled to the point that he is not capable of performing work beyond the sedentary level (EX 1). In his 2005 supplemental report, Dr. Zaldivar opined that the severe irreversible obstruction had worsened and this condition prevented him from working. He further opined, based on chest X-ray and CT scan evidence, that the Claimant does not suffer from CWP, but rather bullous emphysema (EX 7). He attributed this condition to the Claimant's cigarette smoking.

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[18] I also take judicial notice of Dr. Rasmussen's qualifications. His B-readership of each doctor is found at the National Institute for Occupational Safety and Health's Certified B-reader list, available at http://cdc.gov/niosh/topics/chestradiography/b-reader-list.html. Evidence that Dr. Rasmussen is board certified in internal medicine is presented by the American Board of Medical Specialties, available at www.ambs.org.

Dr. Gregory Fino, a B-reader who is board-certified in internal medicine with a sub-specialty in pulmonology, offered a consultation report dated August 23, 2005 based on his review of the Claimant's medical records (EX 5). In accordance with 20 C.F.R. § 725.414(c), his deposition transcript is also considered (EX 8). Dr. Fino noted 42 years of coal mine employment and the varied accounts of his smoking history.

Dr. Fino stated that the Claimant has a progressive disabling obstructive ventilatory abnormality. He further reported elevated lung volumes, a reduction in diffusing capacities resting and exercise-induced hypoxemia, and significant bullous emphysema. Dr. Fino concluded that there is insufficient evidence to diagnose CWP. He further stated that the Claimant does suffer from a disabling respiratory impairment that prevents him from returning to his previous mining job, or a job requiring similar effort. However, Dr. Fino opined that bullous emphysema, not CWP, has caused this impairment. Dr. Fino further asserted that bullous emphysema is a type of emphysema that is not associated with CWP.

IV. Physician Office Notes

The Employer has submitted EX 6 and EX 10, both of which constitute physicians notes, admissible under 20 C.F.R. § 725.414(a)(4). Both contain the records of Dr. Ron Stollings, who treated the Claimant from July 10, 2001-October 3, 2002 (EX 6) and September 5, 2002-June 3, 2005 (EX 10) for chronic obstructive pulmonary disease.

EX 6 includes a CT scan dated July 17, 2002, which noted "emphysematous changes with bullous formation in the lungs bilaterally." It also includes a chest X-ray reading dated July 12, 2002, which noted "advanced hyperinflated lungs suggestive of COPD" and "bullous disease at the left medial lung base." It also includes a reading by Dr. J.A. Willis of a chest X-ray dated December 7, 2001, which was compared with readings of three previous X-rays. Dr. Willis reported chronic changes with bullous disease diffusely similar to the previous exams, scarring in the right upper lobe, and insufficient evidence of occupational pneumoconiosis.

EX 10 includes a September 5, 2002 X-ray reading and comparison of that reading to the July 12, 2002 reading. It reports "no gross signs of acute infiltrates or signs or failure in this patient with severe emphysema."

V. Witness Testimony

The Claimant testified that he worked from 1949 until 1992 in coal mine employment, except for two years of military service (TR 11-17). He stated that his various jobs he performed generally involved exposure to significant coal dust (TR 11-20). The Claimant also testified as to his smoking condition. He stated that he smoked "off and on" for "20 [to] 25 years." (TR 25). As to intake level, he stated "a pack would last me a day and a half, sometimes maybe two days." (TR 25). With respect to his health, the Claimant testified that he has been on continuous oxygen for three years (TR 28). He also takes several medications regularly (TR 29). He frequently has difficulty sleeping (TR 29). He has not worked since he left coal mine employment and is unable to drive (TR 30).

VI. Evidence from Prior Claims

Because there exists a material change in the Claimant's condition since the most recent prior denial of his claim, the evidence from his prior claims is considered for this claim. 20 C.F.R. § 725.309(d)(1).[19] However, because the Claimant withdrew his second claim, and a withdrawn claim is treated is if it were never filed, evidence from that claim is not considered.[20]

The Claimant's third claim included the following medical evidence:

1) Three chest X-ray readings, two of which were negative and one positive for the presence of pneumoconiosis as defined by the Regulations.
2) Two PFS tests, both of which produced qualifying values.
3) One blood-gas study, which did not produce a qualifying value.
4) A December 4, 1993 medical report by Dr. Ranavaya, who concluded, based on radiological testing, that the Claimant suffered from pneumoconiosis. Dr. Ranavaya also characterized the Claimant's disability as a moderate impairment and opined that the pneumoconiosis was a "major" contributor to the disability.

The Claimant's first claim included the following medical evidence:

1) Four chest X-ray readings, all of which were negative for the presence of pneumoconiosis as defined by the Regulations.
2) Two PFS tests, both of which produced non-qualifying values.
3) A blood-gas study which produced qualifying values.
4) Two medical reports: A November 10, 1980 by Dr. Starr finding no evidence of pneumoconiosis, a mild obstructive deficit, and no significant abnormality of pulmonary function; and, a November 6, 1979 report, which states that the Claimant suffers from a chronic obstructive pulmonary disease but reports no X-ray evidence of pneumoconiosis.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Entitlement to Benefits

This claim must be adjudicated under the regulations at 20 C.F.R. Part 718 because it was filed after March 31, 1980. Under this Part, the claimant must establish, by a preponderance of the evidence, that: (1) he has pneumoconiosis; (2) his pneumoconiosis arose out of coal mine employment; (3) he is totally disabled; (4) the pneumoconiosis contributes to the total disability. 20 C.F.R. § 725.202(d)(2) (citing 20 C.F.R. § 718.202-204). Failure to establish any one of these elements precludes entitlement to benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26 (1987); and, *Perry v.*

[19] For a discussion of why a material change exists, see *infra* Part A.
[20] *See supra* note 2 and accompanying text.

Director, OWCP, 9 B.L.R. 1-1 (1986). The claimant bears the burden of proving each element of the claim by a preponderance of the evidence, except insofar as a presumption may apply. *See Director, OWCP v. Mangifest*, 826 F.2d 1318, 1320 (3rd Cir. 1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986). Moreover, "[T]he presence of evidence favorable to the claimant or even a tie in the proof will not suffice to meet that burden." *Eastover Mining Co. v. Director, OWCP [Williams]*,338 F.3d 501, No. 01-4064 (6th Cir. July 31, 2003), *citing Greenwhich Collieries [Ondecko]*, 512 U.S. 267 at 281.

Because this is the claimant's fourth claim for benefits, and it was filed after January 19, 2001, it must be adjudicated under the new regulations.[21] Although the new regulations dispense with the "material change in conditions" language of the older regulations, the criteria remain similar to the "one-element" standard set forth by the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994)[22], which was adopted by the United States Court of Appeals for the Fourth Circuit, in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) *rev'g* 57 F.3d 402 (4th Cir. 1995), *cert. den.* 117 S.Ct. 763 (1997). In *Dempsey v. Sewell Coal Co. & Director, OWCP,* 23 B.L.R. 1-53 (2004), the Board held that where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement. . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. Section 725.309(d); *White v. New White Coal Co., Inc*., 23 B.L.R. 1-1, 1-3 (2004). According to the Board, the "applicable conditions of entitlement" are

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[21] Section 725.309(d)(For duplicate claims filed on or after Jan. 19, 2001)(65 Fed. Reg. 80057 & 80067):

(d) If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see § 725.502(a)(2)), the later claim shall be considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in accordance with the provisions of subpart E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see Sections 725.202(d)(miner), 725.212(spouse), 725.218(child), and 725.222(parent, brother or sister)) has changed since the date upon which the order denying the prior claim became final. The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:

(1) any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.

(2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as a miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.

(3) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement. A subsequent claim filed by a surviving spouse, child, parent, brother, or sister shall be denied unless the applicable conditions of entitlement in such claim include at least one condition unrelated to the miner's physical condition at the time of his death.

(4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

(5) In any case in which a subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final.

[22] Reiterated in *Grundy Mining Co. v. Director, OWCP*[*Flynn*], 353 F.3d 467 (6th Cir. 2003).

"those conditions upon which the prior denial was based." 20 C.F.R. Section 725.309(d)(2).

To assess whether a material change in conditions is established, the Administrative Law Judge ("Administrative Law Judge") must consider all of the new evidence, favorable and unfavorable, and determine whether the claimant has proven, at least one of the elements of entitlement previously adjudicated against him in the prior denial. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) *rev'g* 57 F.3d 402 (4th Cir. 1995), *cert. den.* 117 S.Ct. 763 (1997); *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994); and *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 B.L.R. 2-76 (3rd Cir. 1995). *See Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 792 (4th Cir. 1990). If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. Unlike the Sixth Circuit in *Sharondale,* the Fourth Circuit does not require consideration of the evidence in the prior claim to determine whether it "differ[s] qualitatively" from the new evidence. *Lisa Lee Mines*, 86 F.3d at 1363 n. 11.] If the miner demonstrates the material change, The Administrative Law Judge must then consider whether all of the record evidence, including that submitted with the previous claim, supports a finding of entitlement to benefits. *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994); *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3d Cir. 1995).

In *Caudill v. Arch of Kentucky, Inc.*, 22 B.R.B. 1-97 (2000)(*en banc on recon.*), the Benefits Review Board held the "material change" standard of section 725.309 "requires an adverse finding on an element of entitlement because it is necessary to establish a baseline from which to gauge whether a material change in conditions has occurred." Unless an element has previously been adjudicated against a claimant, "new evidence cannot establish that a miner's condition has changed with respect to that element."

The Claimant's most recent claim was denied by the District Director level because the Claimant failed to establish the presence of pneumoconiosis, that the disease was caused at least in part by coal mine work, and total disability, and that the disability was due to pneumoconiosis.[23] Therefore, the most recent denial was based on the Claimant's failure to establish all four conditions for entitlement under § 725.202(d). Under the *Sharondale* standard, the claimant must show the existence of one of these elements by way of newly submitted medical evidence in order to show that a material change in condition has occurred. If he can show that a material change has occurred, then the entire record must be considered in determining whether he is entitled to benefits.

The Claimant has shown a material change in condition with respect to total disability. As discussed more fully in *infra* Part D, the Claimant has established that he is totally disabled based on PFS tests with qualifying values, blood gas studies with qualifying values, and reasoned medical opinions concluding that the Claimant is totally disabled. Therefore, the Claimant has

[23] The District Director's decision states that there are three elements of entitlement, combining total disability and disability causation. However, the Regulations list four distinct elements of entitlement. *See* 20 C.F.R. § 725.203(d)(2)(i)-(iv). Moreover, the Regulations specifically parse total disability and disability causation into two distinct elements. *See* 20 C.F.R. § 725.203(d)(2)(iii)&(iv). Therefore, I find, notwithstanding the language employed in the District Director's decision that the prior claim was denied because of all four elements. This finding is consistent with *Dempsey*, in which the Board affirmed the Administrative Law Judge's decision that a prior denial was based on both total disability and disability causation when the prior decision of denial stated the Claimant did not show he was "totally disabled by the disease." *Dempsey* at 1-64.

shown that a material change in condition has occurred and the entire record will be considered in determining whether he is entitled to benefits.

B. Existence of Pneumoconiosis

Pneumoconiosis is defined as a "chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment."[24] 30 U.S.C. § 902(b) and 20 C.F.R. § 718.201. The definition is not confined to "coal workers' pneumoconiosis," but also includes other diseases arising out of coal mine employment, such as anthracosilisosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis. 20 C.F.R. § 718.201.[25]

The term "arising out of coal mine employment" is defined as including "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or

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[24] Pneumoconiosis is a progressive and irreversible disease; once present, it does not go away. *Mullins Coal Co. v. Director, OWCP,* 484 U.S. 135, 151 (1987); *Lisa Lee Mines v. Director*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) at 1362; *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3rd Cir. 1995) at 314-315. In *Henley v. Cowan and Co*., 21 B.L.R. 1-148 (May 11, 1999), the Board holds that aggravation of a pulmonary condition by dust exposure in coal mine employment must be "significant and permanent" in order to qualify as CWP, under the Act. In *Workman v. Eastern Associated Coal Corp.,* 23 B.L.R. 1-22, BRB No. 02-0727 BLA (Aug. 19, 2004)(order on recon)(*En banc*) the Board ruled that because the potential for progressivity and latency is inherent in every case, a miner who proves the presence of pneumoconiosis that was not manifest at the cessation of his coal mine employment, or who proves that his pneumoconiosis is currently disabling when it was previously not, has demonstrated that the disease from which he suffers is of a progressive nature. In amending section 718.201, DOL concluded chronic dust diseases of the lung and its sequelae arising out of coal mine employment "may be latent and progressive, albeit in a minority of cases." *See* 64 Fed. Reg. 54978-79 (Oct. 8, 1999); 65 Fed. Reg. 79937-44, 79968-72 (Dec. 20, 2000); 68 Fed. Reg. 69930-31 (Dec. 15, 2003). "Although every case of pneumoconiosis does not possess these characteristics, the regulation was designed to prevent operators from asserting that pneumoconiosis is never latent and progressive. 20 C.F.R. Section 718.201(c); *see National Mining Association, et al, v. Chao, Sec. of Labor,* 160 F. Supp. 2d 47 (D.D.C. Aug. 9, 2001) *aff'd*, 292 F.3d 849 (D.C. Cir. 2002)(*"NMA")*, 292 F.3d at 863." *Midland Coal Co. v. Director, OWCP[Shores]*, 358 F.3d 486 (7th Cir. 2004). Seventh Circuit upheld DOL's 2001 definition of CWP as a latent and progressive disease. DOL's regulation, on this scientific finding is entitled to deference. It is designed to prevent operators from claiming CWP is never latent and progressive.

[25] Regulatory amendments, effective January 19, 2001, state:

(a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.

(1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.
(Emphasis added).

substantially aggravated by, dust exposure in coal mine employment."[26] Thus, "pneumoconiosis", as defined by the Act, has a much broader legal meaning than does the medical definition.

Hence, this broad definition "effectively allows for the compensation of miners suffering from a variety of respiratory problems that may bear a relationship to their employment in the coal mines." *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 14 B.L.R. 2-68, 2-78 (1990), 914 F.2d 35 (4th Cir. 1990) *citing, Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938 (4th Cir. 1980).

Thus, asthma, asthmatic bronchitis, or emphysema may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure. *Robinson v. Director, OWCP*, 3 B.L.R. 1-798.7 (1981); *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1983).[27] Likewise, chronic obstructive pulmonary disease may be encompassed within the legal definition of pneumoconiosis. *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173 (4th Cir. 1995); *see also* 20 C.F.R. § 718.201(a)(2).The claimant has the burden of proving the existence of pneumoconiosis. The Regulations provide the means of establishing the existence of pneumoconiosis by: (1) a chest X-ray meeting the criteria set forth in 20 C.F.R. § 718.202(a)(1); (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. § 718.106; (3) application of the irrebuttable presumption for "complicated pneumoconiosis" found in 20 C.F.R. § 718.304; or (4) a determination of the existence of pneumoconiosis made by a physician exercising sound judgment, based upon certain clinical data and medical and work histories, and supported by a reasoned medical opinion. 20 C.F.R. § 718.202(a)(4).

In *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000), the Fourth Circuit held that the Administrative Law Judge must weigh all evidence together under 20 C.F.R. § 718.202(a) to determine whether the miner suffered from coal workers' pneumoconiosis. This is contrary to the BRB's view that an Administrative Law Judge may weigh the evidence under each subsection separately, i.e. X-ray evidence at § 718.202(a)(1) is weighed apart from the medical opinion evidence at § 718.202(a)(4). In so holding, the court cited to the Third Circuit's decision in *Penn Allegheny Coal Co. v. Williams,* 114 F.3d 22, 24-25 (3d Cir. 1997) which requires the same analysis.

The Claimant cannot establish pneumoconiosis pursuant to subsection 718.202(a)(2) because there is no biopsy evidence in the record. The Claimant cannot establish pneumoconiosis under § 718.202(a)(3), as none of that sections presumptions are applicable to a living miner's claim filed after January 1, 1982, with no evidence of complicated pneumoconiosis. Therefore,

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[26] The definition of pneumoconiosis, in 20 C.F.R. section 718.201, does not contain a requirement that "coal dust specific diseases …attain the status of an 'impairment.' To be classified as 'pneumoconiosis.' The definition is satisfied whenever one of these diseases is present in the miner at a detectable level; whether or not the particular disease exists to such an extent as to become compensable is a separate question." *Clinchfield Coal v. Fuller*, 180 F.3d 622, 625 (4th Cir. June 25, 1999). Moreover, the legal definition of pneumoconiosis "encompasses a wide variety of conditions; among those are diseases whose etiology is not the inhalation of coal dust, but whose respiratory and pulmonary symptomatology have nevertheless been made worse by coal dust exposure." *Id* (citing *Warth v. Southern Ohio Coal Co.*, 30 F.3d 173, 175 (4th Cir. 1995)).

[27] In *Robinson*, however, while the BRB recognized the significance of these impairments, it also noted the need for medical evidence of record to link them to the claimant's coal mine employment.

in this case, the Claimant can only establish the existence of pneumoconiosis based on X-ray evidence and/or medical reports.

1. Chest X-rays

The chest X-rays do not establish the presence of pneumoconiosis. In weighing chest X-ray evidence, an Administrative Law Judge may accord substantial weight to the numerical superiority of positive or negative X-rays, so long as doing so is supported by substantial evidence. *Edmiston v. F & R Coal*, 14. B.L.R. 1-65 (1991). It is noteworthy, however, that the Fourth Circuit has viewed this approach with disfavor when it amounts to merely "counting heads." *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992). However, the Administrative Law Judge may "side with the majority" after carefully weighing all the evidence. *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1277 (7th Cir. 1993).

In this case, when considering the chest X-ray evidence in its totality, the numerical superiority is instructive. Of the twelve X-ray readings in the record that comply with format required by the Regulations, ten are negative and two are positive. This alone would amount to mere "head counting," and could not be outcome determinative. However, when considered in concert with other evidence pertaining to the chest X-rays, the overwhelming percentage of negative readings supports the conclusion that the Claimant has failed to establish the presence of pneumoconiosis. Specifically, the qualifications of the physicians who reported positive and negative X-rays are substantially similar.[28] Additionally, the X-ray evidence from the fourth claim produced no more positive readings that the evidence from the prior claims; therefore, the recency of the X-ray evidence provides no basis for deviating from what the numerical superiority reveals. Finally, as demonstrated in the discussion of medical reports *infra*, the numerical superiority of the X-ray evidence provides a conclusion consistent with that from the medical reports concerning the presence of pneumoconiosis. Therefore, when considering the numerical superiority of the chest X-ray in concert with the sum of the medical evidence, the X-ray evidence does not support the establishment of the presence of pneumoconiosis.

2. Medical Reports

The medical reports likewise do not support a finding that the Claimant has pneumoconiosis.

A determination of the existence of pneumoconiosis can be made if a physician, exercising sound medical judgment, based upon certain clinical data, medical and work histories and supported by a reasoned medical opinion, finds the miner suffers or suffered from pneumoconiosis, as defined in § 718.201, notwithstanding a negative X-ray. 20 C.F.R. § 718.202(a).

[28] The Regulations provide that "where two or more X-ray reports are in conflict, in evaluating such X-ray reports, consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." 20 C.F.R. § 718.202(a)(1). However, this point of distinction is not applicable to this case as the two positive readings were by doctors who are either B-readers, Board-certified or both. The record reflects that six of the negative readings were by doctors who were B-readers, Board-certified, or both. Therefore, the qualifications of the physicians provide no meaningful basis for distinguishing between the readings.

A determination of the existence of pneumoconiosis can be made if a physician, exercising sound medical judgment, based upon certain clinical data, medical and work histories and supported by a reasoned medical opinion, finds the miner suffers or suffered from pneumoconiosis, as defined in § 718.201, notwithstanding a negative X-ray. 20 C.F.R. § 718.202(a).

To be credited, a medical report must be both well-documented and well-reasoned. A "documented" report sets forth the clinical findings, observations, and facts on which the doctor has based the diagnosis. *Fields v. Director, OWCP*, 10 B.L.R. 1-19 (1987). A report is "reasoned" if the documentation supports the doctor's assessment of the miner's health. *Id*. Upon finding a medical report to be unreasoned, an Administrative Law Judge may reject it entirely or accord it diminished weight in crediting its conclusions. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989).

There are five medical reports concluding that the Claimant does not suffer from pneumoconiosis and two that report the presence of the disease.[29] Of those seven reports, four were submitted in connection with the prior current claim and three in connection with the prior claim. Of the four connected to the current claim, three report negative findings and one is positive for the presence of pneumoconiosis.

I find at the outset that the medical reports connected with the current claim are more determinative that those connected with prior claims because the former are based on more extensive objective information. In *Church v. Eastern Assoc. Coal Corp.*, 20 B.L.R. 1-18 (1996), the Board held that the Administrative Law Judge correctly assigned greater weight to medical opinions that were based upon, "extensive medical information gathered over a period of years." In this case, because the various claims span several decades, the reports connected with the current claim necessarily consider a broader scope of objective information. This is particularly true regarding the issue of the existence of pneumoconiosis. Dr. Ranavaya bases his conclusion that the Claimant suffers from pneumoconiosis on a single positive X-ray reading (DX 3). Accordingly, the two reports in DX 1, which find no pneumoconiosis, are also based on X-ray evidence which was relatively underdeveloped in the context of the entire claim. Therefore, the medical reports submitted in connection with the current claim are most relevant in determining whether or not the Claimant has established the presence of pneumoconiosis.

Of those submitted in connection with the current claim, I accord Dr. Zaldivar's report the most weight on the issue of the existence of pneumoconiosis. Dr. Zaldivar's report, however, is accorded diminished weight to the extent that he relied on evidence from the Claimant's second claim. As stated, because that claim was withdrawn and such claims are treated if they were never filed, evidence from that claim is not in the record. In *Demsey v. Sewell Coal Co*., 23 B.L.R. 1-53 (2004), the Board stated that information that appears in a medical report must be admissible in the claim. Because the evidence submitted in connection with the Claimant's second claim is not admitted in this claim, Dr. Zaldivar's report is accorded diminished weight to

[29] Dr. Walker (DX 13), Dr. Zaldivar (EX 1, 7, 11), Dr. Fino (EX 5), Dr. Starr (DX 1), and Dr. Daniel (DX 1) all report an absence of pneumoconiosis. Dr. Rasmussen (CX 2) and Dr. Ranavaya (DX 3) both report the presence of pneumoconiosis.

the extent that it relies on medical information submitted in connection with the Claimant's second claim.

This point is particularly true with respect to Dr. Zaldivar's comparisons between his 1991 examination of the Claimant and subsequent examinations. Dr. Zaldivar's 1991 examination report was submitted in connection with the Claimant's second claim. In EX 1, Dr. Zaldivar stated that a comparison of his 2001 and 1991 examinations led him to conclude that the Claimant did not suffer from CWP but rather emphysema. He also premised this conclusion on his own negative X-ray reading. This conclusion is accorded significantly diminished weight as it is based substantially on Dr. Zaldivar's 1991 report, which is not admitted in the current claim.

This point, however is inapplicable to Dr. Zaldivar's comparison between his 2005 and 2001 examinations that he stated in EX 8. Moreover, in that document, Dr. Zaldivar premised his finding of an absence of pneumoconiosis on a breadth of recent objective testing submitted in connection with the current claim. Therefore, Dr. Zaldivar's conclusion that the Claimant does not suffer from CWP, as expressed primarily in EX 7, is accorded significant weight.

Dr. Fino's consultation report (EX 5) is also accorded diminished weight to the degree that he referred to medical evidence submitted for the second claim. Dr. Fino's conclusion that there is insufficient medical evidence to establish the presence of CWP, however, is well-supported by medical evidence that is admitted in this claim. Therefore, the weight of his report is only moderately diminished for reference to inadmissible evidence; the remainder of his conclusion is credited accordingly.

The weight of Dr. Rasmussen's report is diminished because I find it not to be well-documented or well-reasoned. Dr. Rasmussen makes two comments in his report regarding the presence of pneumoconiosis. First, he stated, "It is medically reasonable to conclude the patient has coal workers' pneumoconiosis, which arose from his coal mine employment." (CX 2 at 3). Second, after a discussion of academic studies, he wrote, "Mr. Miller has totally disabling chronic lung disease, which must be considered in significant part the consequence of his coal mine dust exposure. Thus, Mr. Miller has both clinical coalworkers' pneumoconiosis and legal pneumoconiosis in the form of COPD emphysema, which is the major cause of his disabling chronic lung disease." (CX 2 at 5-6). Both statements are accorded diminished weight toward the establishing the presence of pneumoconiosis.

The first statement is not well documented. As stated *supra*, a medical report is well-documented if it adequately sets forth the objective data on which the doctor has based the opinion. *Fields v. Director, OWCP*, 10 B.L.R. 1-19 (1987). Dr. Rasmussen concluded that the Claimant exhibited X-ray changes consistent with pneumoconiosis, yet he only cited one X-ray reading in support. He did not acknowledge any of the negative X-ray readings. One X-ray is insufficient to support such a conclusion. A conclusion indicating a change in X-ray results that only cites one test is inherently flawed as there is no point of comparison. Therefore, he has not adequately set forth sufficient objective date that could give rise to such a conclusion. Accordingly, this conclusion is not well-documented as prescribed by *Fields*.

His second statement is also accorded diminished weight because it is not well reasoned. As stated *supra*, a medical report is well reasoned if the documentation it presents supports the doctor's conclusion regarding *the miner's* health. *Fields v. Director, OWCP*, 10 B.L.R. 1-19 (1987) (emphasis added). Dr. Rasmussen's second conclusion is predicated upon a bevy of academic studies which taken collectively, stand for the proposition that cigarette smoking and coal dust exposure can contribute indistinguishably to chronic obstructive pulmonary disease. Dr. Rasmussen then related these studies to his assessment that the Claimant has a totally disabling chronic lung disease and was exposed to both cigarette smoke and coal dust. From this, he concluded that the Claimant has both clinical and legal pneumoconiosis. Dr. Rasmussen, however, did does not support this ultimate conclusion with specific objective evidence related to the Claimant. Therefore, his conclusion does not meet the standard for a well-reasoned report, as announced in *Fields*, as to the existence of pneumoconiosis.

Dr. Walker's report (DX 13) is moderately well-documented and well-reasoned as it relates to CWP. However, it deserves reduced weight toward this issue because it is premised upon only a small fraction of the overall medical evidence present in this case. Moreover, it is unreasoned with respect to the etiology of the diagnosis. An Administrative Law Judge may accord a medical report diminished weight if the report it does not present a "complete picture" of a Claimant's health. *Stark v. Director, OWCP*, 9 B.L.R. 1-36 (1986). Because of the comparitively limited medical testing upon which Dr. Walker based his opinion, such is the case with his report. This point is particularly true on the issue of the existence of clinical pneumoconiosis, in which Dr. Walker concluded that the Claimant does not suffer from CWP based on one chest X-ray reading. With respect to the etiology, the report merely lists two causes without explaining their relationship to the diagnosis. Therefore, the report fails to adequately support this part of the diagnosis with documentation, as mandated by *Fields*.

The treatment records of Dr. Stollings are also instructive (EX 6, 10). Dr. Stollings treated the Claimant for approximately four years for chronic obstructive pulmonary disease, yet he never mentioned the presence of pneumoconiosis. The only reference to pneumoconiosis in his treatment records is Dr. Willis's chest X-ray reading, which reports findings insufficient to establish a diagnosis of occupational pneumoconiosis (EX 6). While the absence of any diagnosis of pneumoconiosis in Dr. Stollings' records is not outcome determinative, the fact that such a lengthy period of pulmonary treatment included no such diagnosis is significant.

In considering the medical report and treatment record evidence in total, I find that it fails to support a finding of either clinical or legal pneumoconiosis. With respect to the former, the only doctor to diagnose CWP is Dr. Rasmussen, who is largely discredited for the aforementioned reasons. All three other doctors, whose opinions are accorded more weight, concluded that the Claimant does not suffer from CWP. These conclusions are buttressed by the chest X-ray evidence, which, as stated *supra*, also supports a finding of no CWP.

The weight of the medical opinion evidence also fails to establish that the Claimant suffered from legal pneumoconiosis. Three physicians- Drs. Zaldivar, Fino, and Walker- all diagnosed the Claimant with bullous emphysema. As stated, legal pneumoconiosis can include any chronic lung disease or impairment arising out of coal mine employment. 20 C.F.R. § 718.201(a)(2). This definition may include emphysema, provided that it arose out of coal mine

employment. *See Hughes v. Clinchfield Coal Co.*, 21 B.L.R. 1-34 (1999). The burden is on the Claimant to establish, by affirmative medical or clinical evidence, that a respiratory or pulmonary impairment arose out of coal mine employment. *Robinson v. Director, OWCP*, 3 B.L.R. 1-798.7, 1-798.8 (1981). In this case, the Claimant has failed to meet this burden.

The Claimant has provided scant medical evidence in support of this position. Dr. Rasmussen's general conclusion that coal dust contributed to his pulmonary disability does not provide specific evidence that emphysema arose from coal mine employment. Dr. Walker's opinion in DX 13 does indicate that the Claimant's bullous emphysema was caused by both tobacco abuse and coal dust exposure. However, as stated *supra*, Dr. Walker's report is moderately deficient because it considered only a small fraction of the submitted medical evidence. Moreover, he did not provide any explanation beyond listing "coal dust exposure" as a cause of the Claimant's bullous emphysema. Therefore, this particular conclusion is not reasoned. Because the Claimant has provided no other affirmative medical or clinical evidence supporting the conclusion that any emphysema arose out of coal mine employment, he has not met his burden of establishing this point as mandated by *Robinson*.[30]

Finally, when considering all of the medical evidence in total, as directed by the Fourth Circuit in *Compton*, I find that it all consistently supports the conclusion that the Claimant has failed to establish the presence of pneumoconiosis.

C. Cause of Pneumoconiosis

If the miner is found to have pneumoconiosis, he must show that it arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). However, because I have found that the Claimant does not have pneumoconiosis, it is inapposite to reach a conclusion on this element.

D. Total Disability

The third element of entitlement is that the Claimant is totally disabled. 20 C.F.R. § 725.202(d)(2)(iii); 20 C.F.R. § 718.204(c). Section 718.204(b)(2)(i) through (b)(2)(iv) and (d) set forth criteria to establish total disability: (i) pulmonary function studies with qualifying values; (ii) blood gas studies with qualifying values; (iii) evidence that miner has pneumoconiosis and suffers from cor pulmonale with right-side congestive heart failure; (iv) reasoned medical opinions concluding the miner's respiratory or pulmonary condition prevents him from engaging in his usual coal mine employment and gainful employment requiring comparable abilities and skills; and lay testimony. Under this subsection, the Administrative Law Judge must consider all the evidence of record and determine whether the record contains "contrary probative evidence." If it does, the Administrative Law Judge must assign this evidence appropriate weight and determine "whether it outweighs the evidence supportive of a

[30] This Court is mindful that Drs. Zaldivar and Fino state repeatedly that bullous emphysema is most commonly caused by heredity and smoking and not associated with simple coal workers' pneumoconiosis. This point, however, is unhelpful in resolving the question of legal pneumoconiosis as the definition of that condition expands beyond simple coal workers' pneumoconiosis. Therefore, the basis of my finding regarding legal pneumoconiosis is not the affirmative arguments of Drs. Zaldivar and Fino but rather the failure of the Claimant to meet his burden under *Robinson*.

finding of total respiratory disability." *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-21 (1987); *see also Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1986), *aff'd on reconsideration en banc*, 9 B.L.R. 1-236 (1987).

Section 718.204(b)(2)(iii) is not applicable because there is no evidence that the claimant suffers from cor pulmonale with right-sided congestive heart failure. Section 718.204(d) is not applicable because it only applies to a survivor's claim or deceased miners' claim in the absence of medical or other relevant evidence.

However, the Claimant has established total disability by the other three means provided by the regulations. Section 718.204(b)(2)(i) provides that a pulmonary function test may establish total disability if its values are equal to or less than those listed in Appendix B of Part 718. Claimants may also demonstrate total disability due to pneumoconiosis based on the results of arterial blood gas studies that evidence an impairment in the transfer of oxygen and carbon dioxide between the lung alveoli and the blood stream. § 718.204(b)(2)(ii). Finally, total disability may be demonstrated, under § 718.204(b)(2)(iv), if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition presents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable or gainful work. § 718.204(b). The Administrative Law Judge must weigh all elements bearing on total disability together, with the Claimant bearing the burden of establishing this element. Finally, total disability may be demonstrated, under § 718.204(b)(2)(iv), if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition presents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable or gainful work. § 718.204(b).

In this case, all PFS tests submitted in connection with the current claim produced qualifying values. Additionally two of the four blood-gas studies submitted in connection with the current claims produced qualifying values. Finally, three medical reports- those submitted by Drs. Rasmussen, Zaldivar, and Fino- all stated that the Claimant is totally disabled. Therefore, I find that the medical evidence, when considered together, establishes that the Claimant is totally disabled.

E. Cause of total disability

The Regulations require a claimant establish his pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary disability. 20 C.F.R. § 718.204(c)(1). However, because I have found that the Claimant has failed to establish the existence of pneumoconiosis, the fourth element of entitlement is inapplicable to this case.

ATTORNEY FEES

The award of attorney's fees, under the Act, is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this

case, the Act prohibits the charging of any fee to the claimant for the representation services rendered to him in pursuit of the claim.

CONCLUSIONS

I find that the Claimant has established a material change in condition since his most recent prior denial. Specifically, I find that he has now established the element of total disability. However, the Claimant has failed to establish the existence of pneumoconiosis. Accordingly, he has also failed to establish that pneumoconiosis arose out of coal mine employment and that total disability is due to pneumoconiosis. He is therefore not entitled to benefits.

ORDER

It is ordered that the claim of DELVIN MILLER for benefits under the Black Lung Benefits Act is hereby DENIED.

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RICHARD A. MORGAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS (Effective Jan. 19, 2001): Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board before the decision becomes final, i.e., at the expiration of thirty (30) days after "filing" (or **receipt by**) with the Division of Coal Mine Workers' Compensation, OWCP, ESA, ("DCMWC"), by filing a Notice of Appeal with the **Benefits Review Board, ATTN: Clerk of the Board, P.O. Box 37601, Washington, D.C. 20013-7601.**[31] At the time you file an appeal with the Board, you **must also send a copy** of the appeal letter **to Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210**. *See* 20 C.F.R. § 725.481.

Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).

[31] 20 C.F.R. § 725.479 (Change effective Jan. 19, 2001). (d) Regardless of any defect in service, **actual receipt** of the decision is suffice to commence the 30-day period for requesting reconsideration or appealing the decision.